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IN THE

Supreme Court of the United States

October Term, 1964
No. 648

DEPARTMENT OF FISH AND GAME of the STATE OF CALIFORNIA,

Petitioner,

vs.

FEDERAL POWER COMMISSION; PACIFIC POWER & LIGHT CO.,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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DEPARTMENT OF FISH AND GAME of the STATE OF CALIFORNIA,

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FEDERAL POWER COMMISSION; PACIFIC POWER & LIGHT CO.,

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petitioner, the Department of Fish and Game of the State of California,[1] prays that a writ of certiorari issue to review the decree of the United States Court of Appeals for the Ninth Circuit, entered on June 8, 1964, in *Pacific Power & Light Co., Department of Fish and Game of the State of California v. Federal Power Commission* (Nos. 18853, 18954, in the Court of Appeals for the Ninth Circuit), opinion reported at 333 F.2d 689.

[1]As used herein:
"Department" refers to petitioner Department of Fish and Game of the State of California.
"Commission" refers to the respondent Federal Power Commission.
"Licensee" refers to respondent Pacific Power & Light Co. and its predecessor in interest, California Oregon Power Co. (often called "COPCO"), to whose interests Pacific succeeded in 1961.

Citations to Opinions Below.

The following decisions are set forth in appendixes hereto:

App. A Decree and opinion of the Court of Appeals for the Ninth Circuit in *Pacific Power & Light Co., Department of Fish and Game of the State of California v. Federal Power Commission,* 333 F.2d 689.

App. B Opinion No. 381 of the Federal Power Commission, *Pacific Power & Light Co., Project No. 2082;* issued March 14, 1963, 29 F.P.C. 478.

App. C Opinion No. 381-A (on rehearing) of the Federal Power Commission; issued August 19, 1963, 30 F.P.C. 499.

Jurisdiction.

The decree and opinion of the Circuit Court of Appeals were filed on June 8, 1964 [R. 522, 508-21 (app. A hereto)]. The Department's petition for rehearing, which was served and filed July 7, 1964, was denied on August 6, 1964 [R. 523]. The jurisdiction of the United States Supreme Court is invoked under 28 U.S.C. § 1254(1) (1958).

Questions Presented.

Section 10(a) of the Federal Power Act (41 Stat. 1068 (1920), as amended, 16 U.S.C. § 803(a) (1958)) requires that all licenses issued by the Commission shall be on condition that the project shall be such as in the Commission's judgment

> "will be best adapted to a comprehensive plan for improving or developing a waterway . . . for . . . beneficial public uses, including recreational purposes . . . ."

Section 10(a) further provides that if necessary to secure "such plan," the Commission shall have authority to require modification of the project and of the plans and specifications of the project works before approval.

The following questions are presented:

1. With respect to operation and maintenance costs for the *fish hatchery facilities* that the Commission has required Licensee to construct at its sole expense at Iron Gate Development pursuant to section 10(a) of the Federal Power Act:

a. Must the Commission require Licensee to bear the operation and maintenance costs for all, not just a part, of the capacity of those fish hatchery facilities, regardless of whether Iron Gate's stream regulation would cause any increase in fish population over natural conditions?[2]

b. Is there substantial evidence in the record:

(1) That any destructive natural fluctuations or changes in river levels would occur under natural conditions?

(2) If so, that the reduction or elimination of any natural fluctuations or changes in river levels by Iron Gate's construction and operation would result in an appreciable increase in the fish population of the Klamath River?

2. With respect to operation and maintenance costs for the *fish trapping and egg collecting facilities* that

[2]We do not object, and have never objected, to paying that small portion of the operation and maintenance costs for fishery facilities at Iron Gate that the Department has voluntarily agreed to bear, namely, such costs for 19 percent of king salmon eggs up to 15,800,000 annually and for all king salmon eggs in excess of 15,800,000 annually. For a fuller explanation, see note 7 *infra*.

Licensee had agreed to construct at its sole expense, and that the Commission required at Iron Gate pursuant to section 10(a) of the Federal Power Act:

a. Did the Department by a 1959 agreement with Licensee, approved by the Commission, impliedly agree to pay for all operation and maintenance costs for those fish trapping and egg collecting facilities? (The Court of Appeals answers in the affirmative, the Commission in the negative.)

b. If the Department did not so agree, then the same issues are presented by the Commission's decision as to the fish trapping and egg collecting facilities that are present above in question 1 as to the fish hatchery facilities, namely:

(1) Must the Commission require Licensee to bear the operation and maintenance costs for all, not just a part, of the capacity of those fish trapping and egg collecting facilities, regardless of whether Iron Gate's stream regulation would cause any increase in fish population over natural conditions?[3]

(2) Is there substantial evidence in the record:

(a) That any destructive natural fluctuations or changes in river levels would occur under natural conditions?

(b) If so, that the reduction or elimination of any natural fluctuations or changes in river levels by Iron Gate's construction and operation would result in an appreciable increase in the fish population of the Klamath River?

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[3]See note 2 *supra*.

Statute Involved.

The statutory provision involved is section 10(a) of the Federal Power Act (41 Stat. 1068 (1920), as amended, 16 U. S. C. § 803(a) (1958)), which provides:

> "All licenses issued under [the Federal Power Act] shall be on the following conditions:
>
> "(a) That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial public uses, including recreational purposes; and if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval."

Statement.

Basis for Jurisdiction of Federal Court of First Instance.

This is a proceeding to review an order of the Federal Power Commission. The jurisdiction of the Court of Appeals for the Ninth Circuit to review that order, based upon section 313(b) of the Federal Power Act (49 Stat. 860 (1935), as amended, 16 U. S. C. § 825l-(b) (1958)),[4] was invoked by timely petitions filed in

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[4]The first sentence of § 313(b) provides:

> "Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States court of appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court

that court by the Department (No. 18954) and by Licensee (No. 18853).

By order filed October 25, 1963, the two proceedings were consolidated [R. 495]. By orders filed November 18, 1963, the motion of each petitioner to intervene in the proceeding initiated by the other was granted [R. 504-05].

Geographic Facts.

Licensee owns a series of dams and hydroelectric plants on the Klamath River in Oregon and California, all covered by one Commission license and collectively designated by the Commission as Project No. 2082. 13 F.P.C. 1 (1954); 23 F.P.C. 59 (1960). The developments considered in this proceeding are located in northern California, just below the Oregon border. In downstream order, these developments are called Copco No. 1, Copco No. 2, and Iron Gate. [For map, see 29 F.P.C. at 487 (app. B at 39A), reproduced at 2 Jt.App. 381.[5]] Power developed at these plants is sold interstate [2 Jt.App. 327].

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of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part."

The order under review relates to a licensee that does business in California and has its principal place of business at Portland, Oregon—both within the geographical boundaries of the Court of Appeals for the Ninth Circuit.

[5]The printed record before the Court of Appeals, certified to this Court, is the joint appendix to the briefs of all parties, consisting of 2 volumes; and the pagination of the joint appendix has been used as the pagination for that portion of the certified record. For convenience, "2 Jt.App. 381", rather than "R. 381", is the form used herein to refer to page 381 in volume 2 of the joint appendix.

Historic Facts

The pending dispute, which relates to fishery facilities at Licensee's Iron Gate Development, is the residue of a larger controversy between the Department and Licensee that has continued for more than four decades.

Licensee constructed Copco No. 1 in 1918 and Copco No. 2 adjacent thereto in 1925. Because Copco No. 1 dam prevented migrations of anadromous fish upstream to spawning areas, Licensee constructed and conveyed to the Department the Fall Creek fish hatchery and fish trapping and egg collecting facilities. (Copco No. 2 plant did not further block these migrations.) The Department bore operation and maintenance costs for those hatchery facilities until 1948, when they were discontinued as uneconomic, and for those trapping and collecting facilities until 1963, when trapping and collecting facilities were completed at Iron Gate. [1 Jt.App. 86, 160-63; 29 F.P.C. at 480 (app. B at 23A).]

Copco No. 1 and Copco No. 2 have been operated as peak-load plants, *i.e.*, generating electric power by release of water only during peak demand periods, which caused sudden fluctuations in the river flow downstream--from 200 to 3200 cubic feet per second [1 Jt.App. 83]. The fluctuations killed anadromous fish downstream by stranding them and endangered human life on the river [1 Jt.App. 17-61, 83, 184].

In 1950, the State sued Licensee in the California courts to enjoin those fluctuations as a public nuisance [29 F.P.C. at 480 (app. B at 24A)]. Looking solely to its own financial self-interest, Licensee decided to construct a reregulating dam rather than to change its method of operation in order to abate this

nuisance. [1 Jt.App. 70-71, 192; 29 F.P.C. at 484 n.15 (app. B at 32A).] In 1957, therefore, Licensee petitioned the Commission for authorization to construct Iron Gate Development, about 8 miles below Copco No. 2, to even out the releases from the Copco plants. [2 Jt.App. 322-31.]

In 1959, in order to facilitate the construction of the reregulating dam, the Department and Licensee entered into an agreement which provided, *inter alia* [2 Jt.App. 260-69]: (1) Licensee would construct the Iron Gate Development. (2) As part of that development, Licensee would construct at its sole expense fish trapping and egg collecting facilities, which were to be conveyed to the Department (par. 3). (3) The Department would dismiss the 1950 lawsuit against Licensee, with prejudice. (4) "[T]he right is reserved to all parties hereto to be heard in any future proceedings in regard to fishery facilities, other than the fish trapping and egg collecting facilities referred to in paragraph 3 thereof" [2 Jt.App. 265].

In January 1960, pursuant to Licensee's application and that 1959 agreement, the Commission made its decision and order authorizing Iron Gate Development (23 F.P.C. 59, reproduced in 2 Jt.App. 331-57).

In March 1961, after an application by Licensee, the Commission issued an order amending the license (25 F.P.C. 579, reproduced in 2 Jt.App. 358-66). Article 50, which was added to the license, provided (25 F.P.C. at 581, reproduced in 2 Jt.App. 362):

> "*The Licensee shall construct*, concurrently with the construction of Iron Gate Dam, and thereafter *operate and maintain permanent fish trapping, collecting, holding, and spawn-taking facilities* and ap-

purtenances *at or near and downstream from Iron Gate Dam as may be prescribed hereafter*[6] by the Commission upon the recommendation of the Secretary of the Interior and the California Department of Fish and Game, after notice and opportunity for hearing." (Emphasis added.)

Licensee accepted this amendment to its license without protest [2 Jt.App. 364-66].

Iron Gate Dam and power plant has been completed and is in operation [1 Jt.App. 168-69; 29 F.P.C. at 481 (app. B at 26A)]. The fish trapping and egg collecting facilities have also been completed, and the Department's operation and maintenance of these facilities was undertaken without prejudice as to the issue of who should bear those operation and maintenance costs [1 Jt.App. 120; 29 F.P.C. at 485 n.18 (app. B at 34A)].

The Present Dispute.

Iron Gate, although satisfactorily ironing out the Copco releases, creates a new major problem that is the subject of this proceeding: Iron Gate Dam blocks about 16 miles of spawning grounds in the Klamath River and its tributaries above Iron Gate and below Copco No. 2 (29 F.P.C. at 485, finding (3) (app. B at 36A)). Approximately 57.1 percent of the anadromous fish passing the Klamathon fish counting sta-

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[6][Footnote ours.] The fish trapping and egg collecting facilities to be "prescribed hereafter" include such facilities previously authorized in January 1960 by Article 42 of the license as amended [23 F.P.C. at 72, reproduced in 2 Jt.App. at 355-56]. Nothing in the record shows that, at the time that Article 50 was added to the license in March 1961, such authorized facilities had yet been "prescribed" (*i.e.*, plans and specifications established). *Cf.* app. A at 14A n. 2.

tion, downstream from Iron Gate, would normally spawn above the Iron Gate dam site. [1 Jt.App. 103-08; 29 F.P.C. at 482, 490 (app. B at 29A, 44A); see also app. A at 10A.]

Accordingly, on August 21, 1961, the Department initiated the current proceedings by filing with the Commission a petition praying that Licensee be required to construct, operate, and maintain, or arrange for construction, operation, and maintenance of "all of the said fish rearing facilities on the Klamath River hereinabove referred to" (*i.e.*, the fish trapping and egg collecting facilities under construction and the fish hatchery facilities proposed in the petition) and that the Commission approve the fish hatchery plans submitted by the Department with the petition. [2 Jt.App. 366-69.] Licensee opposed this petition [2 Jt.App. 370-71].

At the request of the presiding examiner, the parties by a stipulation filed in August 1962 agreed to the size of hatchery facilities to be constructed at Iron Gate if such facilities were required by the Commission, the stipulation being without prejudice to Licensee's contention that it is not responsible for construction, operation, or maintenance thereof [2 Jt.App. 378-80].

The Presiding Examiner's Decision.

The examiner's decision, issued November 14, 1962, recommended that Licensee be required to construct the hatchery facilities at its sole expense but that the Department bear the entire cost of operation and maintenance of all fishery facilities (the fish trapping and egg collecting facilities then completed and the proposed hatchery) at Iron Gate [29 F.P.C. at 487-94 (app. B at 39A-53A)].

The Commission's Decisions.

By its unanimous Opinion No. 381, the Commission required Licensee to construct the hatchery facilities at its sole expense. However, the Commission required Licensee to reimburse the Department for only 80 percent of the operation and maintenance costs of all fishery facilities at Iron Gate. 29 F.P.C. 478 (app. B hereto). The Commission's order, as it read, would seem to require Licensee to reimburse the Department for 80 percent of such costs, even though those facilities were being operated at less than full capacity. Thus, to the extent that the Department utilized those facilities, the Commission's decision appeared to impose 20 percent of such costs upon the State of California without its consent, and regardless of the level of operation (100%, 80%, etc.) being utilized by the Department.

The Department's timely petition for rehearing challenged the Commission's decision to the extent that it appeared to impose 20 percent of operation and maintenance costs for all fishery facilities upon the Department without its consent. The Department did not (and does not) object to paying such costs to the limited extent that it had voluntarily consented to bear such costs for a portion of the king salmon species only.[7] [2 Jt.App. 421-30.] Licensee also petitioned for rehearing [2 Jt.App. 412-21].

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[7]The State has voluntarily consented to bear operation and maintenance costs of Iron Gate fishery facilities that may be incurred for all king salmon eggs taken at Iron Gate over 15,800,000 annually, and 19 percent of the quantity up to 15,800,000. The State has *not* agreed to bear any costs with respect to (1) 81 percent of the king salmon eggs up to 15,800,000 annually; or (2) species other than king salmon (*i.e.*, silver salmon and steelhead trout). (We believe that there is no disagreement among the parties about the extent of this voluntary undertaking by the State.)

The reason the State agrees to pay operation and maintenance costs with respect to king salmon eggs over 15,800,000 annual-

In its sharply divided Opinion No. 381-A on rehearing, the Commission revised its findings and order only insofar as there was omitted, inadvertently, a proviso in the stipulation specifying the size of the hatchery. 30 F.P.C. 499 (app. C hereto).[8]

The Decision of the Court of Appeals.

In its petition to the Court of Appeals to review the order of the Commission, the Department prayed for the following relief [R. 492-93]:

To amend the first sentence of Article 50 of the license as set forth in Opinion No. 381 [29 F.P.C. at 486 (app. B at 38A)] as follows (additions shown by emphasis, omissions shown by strike-out):

> "Licensee shall reimburse the State of California Department of Fish and Game for ~~80 percent~~ *all* of the combined annual cost of operation and mainte-

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ly, and 19 percent of the eggs up to that quantity, is that the State historically paid operation and maintenance costs of the now abandoned Fall Creek facilities and the facilities substituted since Fall Creek's abandonment. (See p. 7 *supra*.) To compensate for loss of spawning grounds above Copco dams, not at issue in this proceeding, Fall Creek handled about 3,000,000 king salmon eggs per year. (This is 19 percent of 15,800,000.) Fall Creek facilities did not preserve the silver salmon and steelhead trout runs eliminated by the Copco dams. Hence, the State's agreement would relieve Licensee of that portion of Iron Gate's operation and maintenance costs attributable to making up for loss of spawning grounds for king salmon above Copco dams, but it would not relieve Licensee of any portion of costs attributable to making up for loss of spawning grounds for all anadromous fish above Iron Gate but below the Copco dams. Iron Gate would perform some of the function formerly performed by Fall Creek in making up for loss of king salmon spawning grounds above Copco dams; but costs for that latter part of the function have historically been paid by the State and, we agree, will continue to be paid by the State.

[8]Significantly, although all five Commissioners joined in the original opinion, they divided as follows in the opinion on rehearing: Commissioners Swidler and Woodward joined in the

nance of the *fish hatchery*[9] facilities and appurtenances constructed *at Iron Gate*[9] pursuant to Article 49 and of the permanent fish trapping, collecting, holding, and spawn-taking facilities and appurtenances constructed at Iron Gate Dam, *save and except for the annual operation and maintenance costs incurred for 19 percent of the king salmon eggs up to 15,800,000 annually taken at Iron Gate and for all of the king salmon eggs in excess of 15,800,000 annually taken at Iron Gate.*"

As to the fish hatchery facilities: The court affirmed the Commission's decision that Licensee construct the fish hatchery at its sole expense. The court also affirmed the Commission's decision that Licensee should reimburse the Department for only 80 percent of operation and maintenance costs of the hatchery, because, the court agreed, the evidence "suggests" that Iron Gate would increase the fish population. However, the court added this important gloss: Article 50 of the Commission's order (29 F.P.C. at 486 (app. B at 38A)) would seem to require Licensee to reimburse the Department for 80 percent of operation and mainte-

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opinion restating the reasons for imposing 20 percent of the operation and maintenance costs for all fishery facilities on the Department. Commissioner O'Connor concurred in the result only, but without opinion or explanation. Commissioners Morgan and Ross, each dissenting in part and each filing a separate statement, disagreed with the Commission's decision to impose a part of operation and maintenance costs upon the State without its consent. The dissenting Commissioners made clear that they had joined in the original opinion assigning 20 percent of the operation and maintenance costs to the State solely upon their belief, proven to be mistaken upon petition for rehearing, that the State had agreed to bear 19 percent of those costs, which figure was simply rounded to 20 percent. As we have just noted (*supra* note 7), the 19 percent figure relates to a portion of the king salmon species only.

[9]These insertions do not change the legal effect, but make express what was already clearly implied.

nance costs regardless of whether the hatchery is operated at full or partial capacity. Thus, if the Department rejects the benefit of full capacity operation (which the Commission does not claim it can require of the Department) and operates at 80 percent capacity, Pacific would apparently be required to pay only 80 percent of 80 percent. The court concluded that the Commission intended that so long as the Department operates the hatchery at 80 percent capacity at least, Licensee should pay all operation and maintenance costs for such 80 percent capacity operation, but not to exceed actual costs. See app. A *infra* at 19A.

As to the fish trapping and egg collecting facilities: The court reversed the Commission and held that on the record the Department should bear all of those operation and maintenance costs for fish trapping and egg collecting facilities. The court held that the Department by the 1959 agreement with Licensee had impliedly agreed to pay for such operation and maintenance and that the Commission had shown no reason to disregard this contract. However, the court concluded that there may be evidence in the record or other evidence may be produced that would justify the Commission's decision as to operation and maintenance costs for those trapping and collecting facilities.

Accordingly, the court remanded to the Commission for further proceedings relating to the operation and maintenance costs of the fish trapping and egg collecting facilities and for clarification of Article 50 as desired.

Reasons for Granting the Writ.

This petition for certiorari raises an important public issue in the administration of the Federal Power

Act that has not been settled by the United States Supreme Court: To what extent must the Commission require a licensee to bear operation and maintenance costs for recreational facilities (such as fishery facilities) that the Commission has required the licensee to include in its project?

The proper resolution of this issue by the United States Supreme Court is required now, for these four reasons: First, it concerns the application of section 10(a), a key substantive provision of the Federal Power Act. Second, it involves the application of that section in the context of a significant recreational resource, namely, anadromous fish. Third, the issue may often arise again in the future regarding projects that may be licensed by the Commission on the many streams in California and in other western states in which anadromous fish thrive. Fourth, the resolution of this issue today with reference to this recreational resource (anadromous fish) may well control the resolution of the same issue tomorrow with reference to any other recreational resource. As such, the issue is of potential concern to every state in the Union.

As to the Fish Hatchery Facilities.

There is no dispute as to the meaning of section 10(a): That section requires any project licensed by the Commission to be best adapted to a comprehensive plan for improving or developing the waterway, *including beneficial public uses such as recreation.* That section also provides that the Commission can require modification of the project to secure such comprehensive plan. Section 10(a) thus empowers the Commission to require the construction, operation, and maintenance of fishery facilities by its licensee. App. A at 8A.

In this case, the Commission has approved, as meeting the standards set by section 10(a), the hatchery facilities of the size and capacity agreed upon by the parties. However, the Commission's order, as the Court of Appeals construes it, required Licensee to bear operation and maintenance costs for only 80 percent of the capacity of those facilities although, as the Court of Appeals observes, the Department may "choose to reject the benefit of full capacity operation (a benefit that the Commission does not claim that it can order the Department to accept) and [operate] at 80 percent" of full capacity (app. A at 19A).

Thus, the Court of Appeals permits the Commission, contrary to the command of section 10(a), to provide something less than a project "best adapted to a comprehensive plan." (The Commission does not contend that imposition upon Licensee of all such costs would render the project financially infeasible.) Operation and maintenance of any part of the capacity of the hatchery facilities, at the decision of the State (or any third party) fails, pro tanto, to complete the comprehensive plan that the Commission itself required.[10] Absent some undertaking on the part of the State (or by some other third party), the Commission can insure comprehensive development under section 10(a) only by imposing all costs for such facilities upon its licensee—the person that must obey the Com-

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[10]So far as the Commission's performance of its statutory function under §10(a) is concerned, it is immaterial whether the Department intervened as a party or initiated these proceedings for fishery facilities at Iron Gate. That is the position asserted by the Commission before the Court of Appeals. (Commission's Brief, pp. 17, 21.)

mission's order to get its license.[11] Otherwise, the decision we challenge here produces this irrational result: Licensee is required to pay for all construction costs for fish hatchery facilities of a specified size, 20 percent of which may never be put to use (at least so far as the Commission's order now provides).

Manifestly, this issue is of paramount importance in the administration of the Federal Power Act in all those western states in which anadromous fish thrive. The Klamath River, involved here, has been called "America's finest steelhead and salmon fishing stream." [1 Jt.App. 106-07.] In California, anadromous fish thrive in numerous streams on which the Commission has in the past and may in the future probably license power dams.[12] This is also true in other western states, particularly Oregon and Washington (both within the geographical boundaries of the Court of Appeals for the

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[11]Licensee has sought and been granted the valuable privilege of using public resources for its private gain. Protection, development, and improvement of those public resources are part of the price that Licensee must pay for that privilege. For that reason, the Commission can require its licensees to provide fishery facilities. That also is the position asserted by the Commission before the Court of Appeals. (Commission's Brief, p. 11.)

[12]This potential impact of the decision below, although obviously substantial, cannot be measured precisely, because of the lack of complete data concerning anadromous fish population and the obvious impossibility of predicting which potential power sites will be developed (or when) by power companies.

However, as to salmon only, official records of the Department of Fish and Game of the State of California show the following ranges or estimates of adult spawners that, by a conservative count, migrate annually in the following major salmon producing streams within California: 11,000 in Clear Creek (a tributary of the Sacramento River); 1,000 to 5,000 in the Cosumnes River; 70,000 in the Eel River; 11,000 to 86,000 in the Feather River; 175,000 in the Klamath River; 4,000 in the Merced River; 10,000 in the Russian River; 35,000 in the Stanislaus River; 50,000 in the Trinity River; 130,000 in the Tuolumne River; and 1,000 to 37,000 in the Yuba River.

Ninth Circuit). It has always been a major concern to these states and their people that the Commission require adequate provisions for anadromous fish in any license for a power project on a stream in which anadromous fish spawn.[13]

It is important that the extent of the Commission's obligation to provide for operation and maintenance of fishery facilities by its licensee be determined now. Otherwise, the Commission may well in future cases, as here, where it supposes that a project will improve fishery resources, fail to assure comprehensive development with regard to fishery resources and unjustifiedly leave a part of such development to be provided by a third person, if at all.

Finally, the error should be corrected now before it can permeate the Commission's decisions regarding conservation or improvement of other natural resources by its licensees.

The only other federal court decision that we have found that touches this issue is *FPC v. Oregon*, 349 U. S. 435 (1955), where the Court observed (349 U. S. at 451-52):

> "The applicant has agreed to provide facilities for conserving the runs of anadromous fish in

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The Department estimates that for each adult salmon reaching the spawning grounds, three salmon have been caught by commercial or sports fishermen. Each female salmon (and about 50% of the adult spawners are usually females) will lay from 3,500 to 7,500 eggs.

A listing of numerous undeveloped power sites on the foregoing rivers appears in an open file report: United States Department of the Interior, Geological Survey, *Gross Theoretical Water Power, Developed and Undeveloped, State of California* 18-28 (1964).

[13]See, *e.g.*, FPC v. Oregon, 349 U.S. 435 (1955); State of Washington Dept. of Game v. FPC, 207 F.2d 391 (9th Cir. 1953), *cert. denied*, 347 U.S. 936 (1954).

> accordance with plans approved by the Federal Power Commission. The capital cost of these facilities and of the reregulating dam, to be borne by the applicant, is estimated at $4,430,000. The total annual cost due to these facilities is estimated at $795,000. The Commission has found each of these estimates to be reasonable. Of the $795,000 annual cost, applicant will bear $410,000 (cost of borrowed money, depreciation and taxes on the capital investment), and the $10,000 maintenance cost of the reregulating dam. In addition, it has offered to contribute $100,000 annually toward the estimated $375,000 cost of operation and maintenance of the fish conservation facilities, and the Commission has retained the power to fix the amount of the applicant's contribution if a sum is not agreed upon."

This Court simply observed what the Commission said it would do, without comment as to the legality of whatever specific action might be taken. The question of whether the licensee may bear something less than 100 percent of operation and maintenance costs for all fishery facilities required by the Commission was not raised or ripe for decision at the time of that opinion.[14]

But even if *FPC v. Oregon* were read as permitting the Commission's licensee, in an appropriate case, to

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[14]We have been advised by an Assistant Attorney General for the State of Oregon, representing the Oregon State Game Commission, that pursuant to Article 27 of the license as amended in 1960 (Portland General Electric Co., 24 F.P.C. 408, 416) the Company is paying 100 percent of the costs of construction, operation, and maintenance of fishery facilities at the Pelton Project.

bear only part of such costs, there is no basis in the present record for such a determination. The Court of Appeals erroneously sustains the Commission that the record "suggests" that construction and operation of Iron Gate Dam will increase the fish population over natural conditions by eliminating natural fluctuations and changes in river levels.[15] App. A at 18A-19A. It is on this basis that the court sustains the Commission's decision that Licensee reimburse the Department for only 80 percent of operation and maintenance costs for fish hatchery facilities at Iron Gate.

There is no evidence in the record whatsoever that "suggests," let alone proves, that construction and operation of Iron Gate Dam will have any effect, beneficial or detrimental, upon the fish population compared with natural conditions. (A regulated flow might, in fact, be detrimental to fish population, *e.g.,* by failing to wash the spawning gravels as efficiently as natural flows or by resulting in a less oxidized supply more susceptible to pollution.) Hence, this reason for a partial reimbursement must fall under any interpretation of the statute.

Furthermore, the question whether Iron Gate's regulation will increase the fish population over natural conditions really misses the point. This case concerns the operation and maintenance costs for certain fishery facilities at Iron Gate. Even if Iron Gate's regulation

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[15]Only two record references were cited by the Commission to the Court of Appeals to support its contention (Commission's Brief, p. 29): One is simply a statement by the Commission staff counsel that such enhancement would occur (1 Jt.App. 224-25), and the other is the assertion in the Commission's opinion on rehearing that such enhancement would occur (2 Jt.App. 440). Neither is evidence.

should increase the fish population, nothing in the record shows that those fishery facilities are designed to do any more than to compensate for the injury to the fishery resource caused by Iron Gate dam's blockage of spawning grounds. There is nothing in the record that would show that those facilities have any capacity to handle an increase in fish population or to provide in any other manner for enhancement of the fishery resource.

As to the Fish Trapping and Egg Collecting Facilities.

There is another major error in the decision below. The Court of Appeals erroneously held that the Department in the 1959 agreement with Licensee [2 Jt.App. 260-69] impliedly agreed to bear all operation and maintenance costs for the fish trapping and egg collecting facilities constructed at Iron Gate. App. A at 14A-17A. As the Court of Appeals recognizes, the Commission ruled to the contrary—that the question of such costs was open for decision in the pending proceedings and was not foreclosed by the 1959 agreement. The agreement was received and relied upon by the Commission in its decision authorizing Iron Gate Development. 23 F.P.C. 59 (1960), reproduced at 2 Jt. App. 331. Furthermore, the Court of Appeals' construction is flatly contradicted by the subsequent conduct of both parties. See pp. 8-9 *supra*.

If this Court should hold that the question of operation and maintenance costs for the fish trapping and egg collecting facilities is not foreclosed by the 1959 agreement (as the Commission ruled and as we contend), then there is presented to the Court with respect to the fish trapping and egg collecting facilities the precise question discussed above with regard to the

fish hatchery facilities: May the Commission require Licensee to reimburse the Department for operation and maintenance costs for only 80 percent of the capacity of the fish trapping and egg collecting facilities? For the same reasons given above, we contend that this Court should review that question and hold that the Commission must require Licensee to reimburse the Department for such costs for 100 percent of the capacity of those fish trapping and egg collecting facilities as well as of the fish hatchery facilities.[16]

Conclusion.

This petition for a writ of certiorari should be granted because the Court of Appeals for the Ninth Circuit has decided—and decided wrongly—an important issue concerning the application of section 10(a) of the Federal Power Act with reference to important recreational resources of the nation. This issue has not been, but should be, settled now by the Supreme Court.

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Respectfully submitted,

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[16]See note 2 *supra*.